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## THE RESTRICTED FREEDOM TO STRIKE: 'FAR-REACHING' ILO JURISPRUDENCE ON THE PUBLIC SECTOR AND ESSENTIAL SERVICES

Professor Tonia Novitz, University of Bristol Law School ([tonia.novitz@bristol.ac.uk](mailto:tonia.novitz@bristol.ac.uk))\*

### 1. Introduction

In the International Labour Organisation (ILO), controversy has arisen regarding the legal basis of the right to strike and, accordingly, its content and scope. The trigger was the 2012 walkout of the employers' group from the ILO Conference Committee on the Application of Standards (CAS) in resistance to the jurisprudence developed by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) on the right to strike under ILO Convention No. 87.<sup>1</sup> By 2014, the International Organisation of Employers (IOE) was claiming that the CEACR had 'formulated a comprehensive corpus of minutely-detailed strike law which amounts to a far-reaching, almost unrestricted, freedom to strike'.<sup>2</sup> This is perhaps an odd statement, for a carefully detailed set of prescriptions seems unlikely to lead to unfettered freedoms. However, as a basis for IOE objections to the CEACR jurisprudence, this assertion still arguably deserves our attention. Not least because in the 2016 Conference Committee on the Application of Standards (CAS), the employers' group were still insisting that ILO Convention No. 87 did not include the right to strike and its modalities; and that any right to strike was not to be regarded as 'absolute' but to be regulated at the 'national level'.<sup>3</sup>

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\* This article is based on an invited paper delivered at a conference on the Justification of the Right to Strike in the ILO System of Standards held in Berlin in April 2016; and responds to the comments of the discussant, Professor Halton Cheadle, one of South African's most eminent labour lawyers and a member of the ILO Committee of Experts on the Application of Conventions and Recommendation (CEACR), as well as the views of other participants at this event. Thanks go to them and to the organisers of my session, Torsten Walter and Helga Nielebock. All errors and omissions are my own.

<sup>1</sup> ILC, 101<sup>st</sup> session, 2012, RECORD OF PROCEEDINGS 19/1, discussed in Claire La Hovary, *Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike* 42(4) INDUSTRIAL LAW JOURNAL 338 (2013); and Janice Bellace, *The ILO and the Right to Strike* 153(1) INTERNATIONAL LABOUR REVIEW (2014) 29.

<sup>2</sup> INTERNATIONAL ORGANISATION OF EMPLOYERS, DO ILO CONVENTIONS 87 AND 98 RECOGNISE A RIGHT TO STRIKE? (2014) at 2.

<sup>3</sup> See ILO International Labour Conference (ILC), Individual Case (CAS), discussion 2016, 105<sup>th</sup> ILC session (2016), Freedom of Association and Protection of the Right to Organise Convention, 12948 (No. 87) – United

This article examines the importance of IOE claims in relation to standards advocated by the CEACR regarding public sector strikes and provision of essential services. In so doing, the political rationale for promoting and restricting strikes is considered. It is argued that, rather than being ‘almost unrestricted’, ILO standards (which may also fairly be termed ‘principles’) are clear and proportionate. Indeed, their common sense approach, which is the result of tripartite deliberation in the ILO Committee on Freedom of Association (CFA), as well as consideration by legal experts in the CEACR,<sup>4</sup> is reflected in their use as a reference point in other human rights litigation. In this sense, ILO jurisprudence on the right to strike is ‘far-reaching’, striking a chord with employer objections in 2012 and 2014. The findings of the CEACR and the CFA are being ‘received’ and ‘promoted’ as ‘soft law labour jurisprudence’, even though they are not necessarily determinative of outcomes in particular cases.<sup>5</sup>

In Europe, specifically in the context of a sovereign debt crisis and austerity policies aimed at the retrenchment of public spending and the reduction of the public service, including the contracting out of what were once State provided essential services,<sup>6</sup> the CEACR jurisprudence also has considerable significance. CEACR analysis of what is appropriate State action, in compliance with obligations under ILO instruments, offers an important basis for critique of what is problematic about contemporary budgetary measures and treatment of

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Kingdom (Ratification: 1949) per ‘the Employer members’ and the ‘Employer member of the United Kingdom’ citing the ‘consensus position of the Government group, as expressed in February 2015’.

<sup>4</sup> For analysis of this ‘dual input into thinking’ and the emergence of ‘a broad and realistic consensus’, see BERNARD GERNIGON, ALBERTO ODERO AND HORACION GUIDO, ILO PRINCIPLES CONCERNING THE RIGHT TO STRIKE (1998) at 59; also discussion of this symbiotic relationship in Tonia Novitz, *The Internationally Recognized Right to Strike: A past, present and future basis upon which to evaluate remedies for unlawful collective action* 30(3) THE INTERNATIONAL JOURNAL OF COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 357 (2014).

<sup>5</sup> See ILC, 101<sup>st</sup> session, 2012, RECORD OF PROCEEDINGS 19/1, at paras 49, 82 and 154 as discussed by La Hovary *supra* note 1 at 342.

<sup>6</sup> See Robert Boyer, *The Four Fallacies of Contemporary Austerity Policies: The lost Keynesian legacy* 36 CAMBRIDGE JOURNAL OF ECONOMICS 283 (2012); CARMEN M REINHART AND KENNETH S ROGOFF, FROM FINANCIAL CRASH TO DEBT CRISIS (2010), Working Paper 15795 <<http://www.nber.org/papers/w15795>> accessed 6 May 2016; STEFAN CLAUWAERT AND ISABELLE SCHÖMANN, THE CRISIS AND NATIONAL LABOUR LAW REFORMS: A MAPPING EXERCISE (2012), ETUI Working Paper 2012.04; and ARISTEA KOUKIADAKI, ISABEL TAVORA, ISABEL AND MIGUEL MARTINEZ LUCIO, THE TRANSFORMATION OF JOINT REGULATION AND LABOUR MARKET POLICY IN EUROPE DURING THE CRISIS: COMPARATIVE PROJECT REPORT (2014).

workers in Europe today. ILO standards regarding the right to strike have perhaps never been more relevant, which may also be why they have come under threat.<sup>7</sup>

This article proceeds by first outlining the established content of a coherent body of findings established by ILO supervisory bodies regarding strikes in the civil service, public sector and essential services, as well as the outright ban on ‘purely political strikes’. It is argued that this corpus follows logically from the principle advocated for some time within the ILO that the right to strike exists to defend the economic and social interests of workers.<sup>8</sup> I shall then examine how that ‘far-reaching’ jurisprudence has received attention from European and other human rights institutions seeking to interpret and apply the principle of ‘freedom of association’. Further, I shall seek to explain the particular significance of ILO standards concerning the right to strike following the financial crisis and, in particular, the sovereign debt crisis still dominating the politics of many European States as well as countries in other continents.

The politics of austerity, have led to shrinkage of the state provision of services and public sector employment. In this setting the restriction of industrial action in the public sector, by civil servants and other workers, has particular resonance. Arguably, the ‘austerity’ policies experienced in Europe can be understood as a re- manifestation of policies imposed on developing countries for some considerable period of time by the International Monetary Fund (IMF) and the World Bank. By the time the ‘Washington consensus’ appeared discredited globally,<sup>9</sup> that prescription for addressing sovereign debt found its ways into the Memoranda of Understanding imposed by the Troika (the IMF, The European Commission

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<sup>7</sup> For analysis regarding the utility of ILO strike jurisprudence on the world stage and how this prompted a response from the employer lobby, see Janice Bellace, *Pushback on the Right to Strike: Resisting the Thickening of Soft Law* in ADELLE BLACKETT AND ANNE TREBILCOCK (EDS), RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW (2015).

<sup>8</sup> ILO, DIGEST OF DECISIONS OF THE COMMITTEE ON FREEDOM OF ASSOCIATION 5<sup>th</sup> ed. (2006) (ILO CFA DIGEST), para. 522-3; see also the CEACR, GENERAL SURVEY ON THE FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING (1984) at 62; CEACR, GENERAL SURVEY ON FREEDOM OF ASSOCIATION (1994), at 66. This remains the position in the REPORT OF THE CEACR ON APPLICATION OF INTERNATIONAL LABOUR STANDARDS (2014) for e.g. at 73: ‘the right to strike is one of the essential means available to trade unions to further and defend the interests of their members’.

<sup>9</sup> Robin Broad and John Cavanagh, *The Death of the Washington Consensus?* 16(3) WORLD POLICY JOURNAL 79 (1999); James M. Cypher, *The Slow Death of the Washington Consensus on Latin America* 25(6) LATIN AMERICAN PERSPECTIVES 47 (1998); Robert K. McCleery and Fernando De Paolis, *The Washington Consensus: A post-mortem* 19 JOURNAL OF ASIAN ECONOMICS 438 (2008).

and the European Central Bank) and into more general prescriptions for economic growth in the European Union (EU) Growth 2020 Strategy.<sup>10</sup> The result is that recent European cases speak to a global commonality of concern with responsible democratic government and public provision of services that unites the developed and developing worlds. In this way, they offer an important illustration of the relevance of ILO principles on the right to strike as a touchstone for concern and legitimate complaint beyond national borders.

Related challenges are presented by action in essential services. Some time ago, we might have assumed that essential services could (and would) be delivered by public sector workers. This palpably is no longer the case. A process of privatization began globally some time ago and has accelerated in European States under austerity, again in an effort to reduce public spending.<sup>11</sup> In response, action is being taken by workers to constrain the ‘contracting out’ of essential services and regulate the new forms of their supply. This is motivated by workers’ self-interest (the desire to preserve jobs, terms and conditions), but also public interest (concerns regarding the quality of service likely to be delivered subsequently).<sup>12</sup> Their motivations might perhaps seem at odds with the notion that strikes should not be ‘purely political’. Indeed, the legitimacy of strikes which make political statements has been fiercely contested, perhaps because such action is seen as potentially disruptive of legitimate democratic processes by governments and to have effects on employers which are beyond their control (as the dispute does not originate with them).<sup>13</sup> However, it is suggested here that, on careful dissection of what we mean by the term ‘political’, a freedom to strike, subject to sensible restrictions, can serve democratic objectives.

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<sup>10</sup> Susanne Lütz and Matthias Kranke, *The European Rescue of the Washington Consensus? EU and IMF lending to Central and Eastern European countries* 21(2) REVIEW OF INTERNATIONAL POLITICAL ECONOMY 310 (2014).

<sup>11</sup> It is interesting that in the recent CEACR report on the *Beamte*, it is observed that ‘civil servants (Beamte) working in state enterprises perform the same tasks after privatization’. See Observation (CEACR) – Germany - Adopted 2014, Published 104<sup>th</sup> ILC Session (2015).

<sup>12</sup> A much publicised example is the UK junior doctors’ strike, in respect of which see: <http://www.theguardian.com/society/2016/feb/01/junior-doctors-strike-to-go-ahead-next-wednesday-says-bma>; and <http://www.independent.co.uk/news/uk/politics/public-overwhelmingly-blame-jeremy-hunt-for-junior-doctors-strike-poll-finds-a6864666.html> accessed 29 September 2016.

<sup>13</sup> See also for this observation TONIA NOVITZ, INTERNATIONAL AND EUROPEAN PROTECTION OF THE RIGHT TO STRIKE (2003), at 56.

## 2. Core elements of ILO jurisprudence on the origins, content and scope of the right to strike

The fundamental starting point of ILO supervisory bodies is that ‘the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests’<sup>14</sup> and ‘an intrinsic corollary to the right to organize protected by Convention No. 87’.<sup>15</sup> The CFA and the CEACR link this entitlement to ‘the right of workers’ and employers’ organizations to organize their activities and to formulate their programmes for the purposes of furthering and defending the interests of their members (Articles 3, 8 and 10 of Convention No. 87)’.<sup>16</sup>

At the time of the employers’ group ‘walk out’ from the CAS in 2012, the employers’ group argued that: ‘the following issues concerning the right to strike should be discussed on a tripartite basis, rather than left to the experts to develop on their own’. These were to include: ‘lawful strikes, including ... political strikes; essential services, especially if on a narrow basis’... etc.<sup>17</sup> This was prior to their preference for national determination of such detailed questions.<sup>18</sup>

It remains a curious request since the ‘interpretation’ of freedom of association and its essential correlative, the right to strike, originated first in the jurisprudence of the CFA decided by tripartite consensus. While the CEACR consists of technical legal experts, the CFA has a tripartite constitution and its findings reflect not only legal niceties, but the consensual findings of employers, workers and governments on the importance of industrial action (and

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<sup>14</sup> ILO CFA DIGEST, para. 522; see also the CEACR, GENERAL SURVEY ON THE FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING (1984) at 62; THE REPORT OF THE CEACR ON APPLICATION OF INTERNATIONAL LABOUR STANDARDS (2014) at 73; and Case No. 3111 (Poland), 378<sup>th</sup> Report of the ILO CFA (2016) para. 674 at para. 708.

<sup>15</sup> ILO CFA DIGEST, para. 523.

<sup>16</sup> CEACR, GENERAL SURVEY ON FREEDOM OF ASSOCIATION (1994), at 66. Note also THE ILO GENERAL SURVEY ON THE FUNDAMENTAL CONVENTIONS CONCERNING RIGHTS AT WORK IN THE LIGHT OF THE ILO DECLARATION ON SOCIAL JUSTICE FOR A FAIR GLOBALIZATION 2008 (2012), 46 et seq.

<sup>17</sup> ILC, 101<sup>st</sup> session, 2012, REPORT OF THE COMMITTEE ON THE APPLICATION OF STANDARDS: SUBMISSION, DISCUSSION AND ADOPTION at 27/2: Mr SYDER (*Employer, United Kingdom; Employer Vice- Chairperson of the Committee on the Application of Standards*). See also for discussion of this claim, Claire La Hovary, *The ILO’s Employers’ Group and the Right to Strike* 22(3) TRANSFER 401 at 402 (2016).

<sup>18</sup> *Supra* note 3.

the identification of standards for its exercise) to the realisation of freedom of association globally. The two have come to complement and reinforce each other.<sup>19</sup>

The CFA jurisprudence (reflected in CEACR findings) has not only been concluded for the benefit of the workers' group. If that were so, it might well be an 'unrestricted freedom'.<sup>20</sup> Instead, the legitimate concerns of government regarding democratic accountability, effective government and the welfare of citizens are reflected in the rules regarding political strikes. Further, the concerns of governments and employers (and, indeed, governments as employers) can be detected in the specific treatment of political strikes, essential services and in the civil service and public sector more generally in line with these principles.

'Strikes of a purely political nature ... do not fall within the scope of the principles of freedom of association.'<sup>21</sup> However, this is subject to two important qualifications. The first is that: 'While purely political strikes do not fall within the scope of the principles of freedom of association, trade unions should be able to have recourse to protest strikes, in particular where aimed at criticizing a government's economic and social policies.'<sup>22</sup> So 'protest' which does not necessarily involve absence from work for a lengthy duration is to be permitted. Secondly, where there is a link to the economic and social interests of workers, industrial action may be taken: 'The occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers.'<sup>23</sup> The number of jobs in the public sector, the types of job available, issues of privatization and contracting out of services, and the terms and conditions of work would all therefore be issues in which workers have a legitimate interest to be defended through industrial action. This would be the case in the context of an over-arching policy aimed at austerity, or cutting public spending. Notably, in a recent

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<sup>19</sup> *Supra* note 4. See also See ITUC, THE RIGHT TO STRIKE AND THE ILO: THE LEGAL FOUNDATIONS (2014) available at [http://www.ituc-csi.org/IMG/pdf/ituc\\_final\\_brief\\_on\\_the\\_right\\_to\\_strike.pdf](http://www.ituc-csi.org/IMG/pdf/ituc_final_brief_on_the_right_to_strike.pdf); and Bellace *supra* note 1 at 30 and 47 – 50.

<sup>20</sup> *Supra* note 2.

<sup>21</sup> ILO CFA DIGEST, para. 528.

<sup>22</sup> *Ibid.*, para. 529.

<sup>23</sup> *Ibid.*, para. 526.

Polish case of 2016, the CFA observed that a ‘Social Dialogue Council’ would assist in defending workers’ occupational and economic interests, the Government still had ‘to take the necessary measures in order to ensure that workers’ organizations are able to express if necessary, through protest actions, more broadly, their views as regards economic and social matters affecting their members’ interests’.<sup>24</sup>

While economic and social interests are legitimate objectives of industrial action (despite their political dimensions), the effects of strikes are also relevant. In this respect, again, the freedom to strike is not unqualified, and nor would we expect either a tripartite body (such as the CFA) or legal experts (such as the CEACR) to find it to be so. Industrial action can be restricted in essential services ‘the interruption of which would endanger the life, personal safety or health of the whole or part of the population’<sup>25</sup> and in the event of ‘an acute national emergency and for a limited period of time’.<sup>26</sup> However, even where there is a strike in essential services ‘temporary measures’ should not be ‘out of proportion to the ends pursued or lead to excesses’.<sup>27</sup> Ideally, a ‘minimum service’ is to be agreed in advance.<sup>28</sup> Essential services may be supplied by a public sector organisation, but (as noted above) this is perhaps less frequently the case, particularly in the context of austerity, where the size of the State is shrinking (along with the public budget).

Industrial action can be further restricted for ‘public servants exercising authority in the name of the State’.<sup>29</sup> This is ostensibly a restriction placed on the identity of the strikers rather the strike’s effects. However, arguably, it is the operation of necessary State functions vital to the welfare of those living within the State, such as delivery of justice through the courts, which is ultimately at stake here. Hence a ‘minimum service’ may be applied here too, where industrial action by such workers is permitted.<sup>30</sup>

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<sup>24</sup> Case No. 3111 (Poland), 378<sup>th</sup> Report of the ILO CFA (2016) para. 674 at para. 712.

<sup>25</sup> ILO CFA DIGEST, at para. 578. In this scenario a minimum service may be appropriate which is proportionate – see paras. 607 and 634.

<sup>26</sup> Ibid., at para. 570. See also in respect of these principles CEACR, GENERAL SURVEY ON FREEDOM OF ASSOCIATION (1994), paras 152, 158 and 159.

<sup>27</sup> ILO CFA DIGEST, at para. 669.

<sup>28</sup> Ibid., para. 612.

<sup>29</sup> Ibid., para. 541.

<sup>30</sup> Ibid., para. 606.



The notion of exercising ‘authority in the name of the State’ is strictly construed by ILO supervisory bodies. It may be notable that the other key challenge to the authority of the CEACR by the employers’ group was in 1994, in the wake of the end of the Cold War and concerning the German practice of excluding all ‘civil servants’ (or *Beamte*) from access to industrial action.<sup>31</sup> This was considered by the CEACR then (as now) to be in violation of the general precept that ‘prohibition of strikes should be limited to public servants exercising authority in the name of the State and to services, the interruption of which would endanger the life, personal safety or health of the whole or part of the population’. However, Germany remained in breach of these principles since the *Beamte* had (and continue to have) special status in that they swear an oath of allegiance to the State that cannot be broken through industrial action in exchange for other employment security and pension benefits. The indignation of the German employer representative, Alfred Wisskirchen, may have arisen partially for this reason but also led to the first challenge to the CEACR’s interpretative authority, although he subsequently elaborated upon his opposition in more extensive ways.<sup>32</sup> This is an issue that I will return to later, for once upon a time the German treatment of civil servants was exceptional, but such an approach is becoming ever more frequent in the context of European austerity.<sup>33</sup>

Both the CFA and CEACR have concluded that, even where restriction is appropriate for ‘public servants’ as designated above, or where essential services are truly at issue, there should be sufficient residual or ‘compensatory’ guarantees for the workers to protect their interests. This would seem to be in accordance with the dispute settlement mechanisms recognised in Article 8 of ILO Convention No. 151 of 1978, but also broader principles of justice. The utility of the work cannot be justified as a means by which to reduce the workers’ welfare. There are to be ‘impartial and prompt conciliation and arbitration

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<sup>31</sup> ILC, 81<sup>st</sup> session, 1994, ILC, REPORT OF THE COMMITTEE ON THE APPLICATION OF STANDARDS, PART TWO: OBSERVATIONS AND INFORMATION ON THE APPLICATION OF CONVENTION at 25/91: C87, *Germany*.

<sup>32</sup> ILC, 81<sup>st</sup> session, 1994, ILC, REPORT OF THE COMMITTEE ON THE APPLICATION OF STANDARDS: SUBMISSION, DISCUSSION AND ADOPTION at 28/90, Mr. WISSKIRCHEN (*Employers’ adviser, Germany; Employer Vice-Chairman of the Committee on the Application of Standards*). See also Alfred Wisskirchen, *The Standard-setting and Monitoring Activity of the ILO: Legal questions and practical experience* 144 INT’L LAB. REV. 253 (2005).

<sup>33</sup> See Case No. 3111 (Poland), 378<sup>th</sup> Report of the ILO CFA (2016) para. 674 at para. 715 where the Committee invited the Government to establish a procedure (i) for determining which public servants are ‘exercising authority in the name of the State and for whom the right to strike can be restricted’ and (ii) ‘for defining the minimum service where appropriate’.

proceedings to ensure that all parties may participate at all stages and in which arbitration proceedings are binding on both parties'.<sup>34</sup> For example, the ILO CFA has found that restrictions placed on the right to strike in the prisons service are problematic insofar as these are not accompanied by unbiased and speedy conciliation and arbitration proceedings, the outcomes of which are fully and properly implemented.<sup>35</sup>

### **3. The reach of ILO jurisprudence in other human rights systems**

ILO jurisprudence and, more particularly, its application in the civil service and public sector employment, was extremely influential in the judgment of the Grand Chamber of the European Court of Human Rights (ECtHR) in *Demir & Baykara v Turkey*. Decided in 2007, this case found that civil service unions were entitled to collective bargaining and enforcement of the resultant collective agreements under Article 11 of the European Convention on Human Rights 1950 (ECHR).<sup>36</sup>

The case concerned a trade union, Tm Bel Sen, which was established in 1990 to represent civil servants. In 1993, this union concluded a collective agreement concerning pay and working conditions with the Gaziantep Municipal Council for a period of two years, but the agreement was not honoured. When the union sought to rely on the collective agreement in court proceedings, their claim was initially upheld by the District Court. However, the decision was eventually overturned by the Cour de Cassation. Moreover, during this time, the Constitution was amended (in 1995) and a Law introduced (in 2001),<sup>37</sup> which meant that, while civil servants' unions could engage in collective bargaining under certain conditions, they were not entitled to enter into valid collective agreements directly with the authorities concerned. Monies originally paid out to civil servants by virtue of the District Court proceedings therefore had to be repaid. A complaint under Article 11 of the ECHR was brought by one of the union members, Mr Kemal Demir, who was asked to repay the sum

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<sup>34</sup> CFA DIGEST, para. 532; GERNIGON ET AL, note 4 at 17-18; and CEACR, GENERAL SURVEY CONCERNING LABOUR RELATIONS AND COLLECTIVE BARGAINING IN THE PUBLIC SERVICE (2013), 169 - 186.

<sup>35</sup> Case No. 2383 (UK), 336<sup>th</sup> Report of the ILO CFA (2005) paras 773 and 777.

<sup>36</sup> Application 34503/97 *Demir and Baykara v Turkey*, judgment of 12 November 2008. See K.D.Ewing and John Hendy, *The Dramatic Implications of Demir and Baykara* 39 INDUSTRIAL L.J. 2 (2010).

<sup>37</sup> Law no. 4688 on civil servants' trade unions, 25 June 2001.

originally granted to him by way of compensation and by Mrs Vicdan Baykara, the President of Tüm Bel Sen.

Here the Grand Chamber of the ECtHR considered it significant that Turkey had ratified ILO Convention No. 98 and placed stress on general recognition that civil servants are entitled to collective bargaining, as is reflected in ILO Convention No. 151, which was also ratified by Turkey.<sup>38</sup> Explicit reference was also made to the finding of the ILO CEACR that the exclusion of 'public servants' from ILO Convention No. 98 (under Article 6) excluded 'only those officials who are directly employed in the administration of the State' alongside the police and armed forces.<sup>39</sup> 'With that exception, all other persons employed by the government, by public enterprises or by autonomous public institutions should benefit... in the same manner as other employees, and consequently should be able to engage in collective bargaining ... (*General Survey 1994, freedom of association and collective bargaining, on Conventions No. 87 and No. 98* [ILO, 1994a], § 200).'<sup>40</sup> Moreover, the ECtHR appreciated that it 'can and must take into account elements of international law other than the Convention' as well as 'the interpretation of such elements by competent organs'.<sup>41</sup>

Subsequently, the ECtHR has accepted that restrictions can lawfully be placed on members of the armed forces, the police and the administration of the State, clearly in line with ILO Convention No. 98 (Article 6). However, even in these cases, restrictions are to be construed strictly and should be confined to the 'exercise' rather than the 'existence' of trade union rights under Article 11. The 'essence' of the right to organise has to be preserved, so that a total ban on the creation of associations in these professions would not comply with Article 11 without a powerful justification.<sup>42</sup>

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<sup>38</sup> *Demir and Baykara v Turkey* *supra* note 36, at paras 147 - 148.

<sup>39</sup> For a recent reiteration of this view of the scope of trade union anti-discrimination principles, see Case No. 2888 (Poland), 363<sup>rd</sup> Report of the CFA (2012) at para. 1084.

<sup>40</sup> *Ibid.*, para. 43.

<sup>41</sup> *Ibid.* at para. 85. For discussion see Virginia Mantouvalou, *Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation* 13 HUMAN RIGHTS LAW REVIEW (2013) 529; and Klaus Lörcher, *The New Social Dimension in the Jurisprudence of the European Court of Human Rights (ECtHR): The Demir and Baykara Judgment, its Methodology and Follow-up* in FILIP DORSSEMONT, KLAUS LÖRCHER AND ISABELLE SCHÖMANN (eds), *THE EUROPEAN CONVENTION IN HUMAN RIGHTS AND THE EMPLOYMENT RELATION* (2013) at 6-10 and 16 - 18.

<sup>42</sup> See Application 10609/10 *Matelly v France*, judgment of 2 October 2014; and Application 45892/09, *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E) v Spain*, judgment of 21 April 2015.

The *Demir* judgment has proved foundational for a finding that the right to strike should also be protected under Article 11 of the ECHR, again even in the civil service.<sup>43</sup> For example, the case of *Enerji Yapi-Yol Sen*<sup>44</sup> concerned another civil servants' union planning a national one day strike constituting peaceful action aimed at securing a collective agreement. On 13 April 1996 the Prime Minister's Public Service Staff Directorate published circular no. 1996/21, which, *inter alia*, prohibited all public sector employees from taking part in this action. Despite the circular, some of the trade union's board members took part in the strike and were subjected to sanctions as a result. The ECtHR accepted that the right to strike was not absolute and could be subject to certain conditions and restrictions, but expressed concern that the sanctions imposed were such as to discourage trade union members and other persons from acting upon a legitimate wish to take part in such a day of strike action or other forms of action aimed at defending their affiliates' interests.<sup>45</sup> The ECtHR concluded, according to the Registrar's summary, that 'the adoption and application of the circular did not answer a "pressing social need" and that there had been disproportionate interference with the applicant union's rights. There had therefore been a violation of Article 11'.<sup>46</sup>

Subsequently, in the *RMT v UK* case, the fact of the ILO employers' walk out was not considered to be sufficient to deter the ECtHR from continued reference to ILO jurisprudence. However, the judgment referred to, but did not ultimately follow either the findings of the European Social Charter Committee of Social Rights or the ILO on secondary action. That decision was taken on the basis that sympathetic action was not the core but 'a secondary or accessory aspect of trade union activity' to which a wider margin of appreciation applied, but it is also possible that the finding was a response to the pressure that employer dissent placed on the Court's previous attempt to 'integrate' ILO

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<sup>43</sup> Dorssemont thereby concludes that the 'ECHR relates the right to strike to an issue of the right to organise...' in Filip Dorssemont, *The Right to Take Collective Action in the Council of Europe: A Tale of One City, Two Instruments and Two Bodies* 27(1) KING'S LAW JOURNAL 67 (2016) at 70.

<sup>44</sup> Application 68959/01 *Enerji Yapi-Yol Sen v Turkey*, judgment of 21 April 2009.

<sup>45</sup> *Ibid.*, para. 35.

<sup>46</sup> Available at: <file:///C:/Users/lwtan/Chrome%20Local%20Downloads/003-2712212-2963054.pdf> (accessed on 29 September 2016). Also discussed by Mimi Zhou, *A Freestanding Right or a Means to an End? The right to strike in the ILO and EU legal frameworks* 15 TRINITY COLLEGE LAW REVIEW 101 (2012) at 116-117.

jurisprudence.<sup>47</sup> More recently, in the case of *Hrvatski Liječnicki Sindikat v Croatia*,<sup>48</sup> it was found that it was a violation of Article 11 (disproportionate to the interests of the public) to prevent a union of medical and dental practitioners seeking to conclude a collective agreement with the Ministry of Health and Social Welfare from taking industrial action for over three years. The judgment describes the strike as ‘the most powerful instrument to protect occupational interests of its members’<sup>49</sup> and extensive reference is made to ILO standards in the ‘Concurring Opinion’ of Judge Pinto de Albuquerque.

So ILO standards are not applied uncritically in ECtHR cases regarding the right to strike, but they are the starting point for much analysis. The considerable attention shown to the views of the ILO supervisory bodies is significant, given the pressures on the ECtHR which have arisen in times of financial crisis to defer to the austerity-based policy prescriptions of the EU.<sup>50</sup>

Further, the European Committee of Social Rights (ECSR) responsible for supervision of the European Social Charter 1961 has embraced the relevance of ILO norms. In the *LO and TCO v Sweden* case,<sup>51</sup> in which the scope of the right to strike was at issue, the International Organisation of Employers (IOE) and BusinessEurope offered their ‘Observations’, which explicitly included reference to the 2012 walk out of the ILO employers’ group (of which the IOE is the Secretariat). Those ‘Observations’ concluded that:

Given the importance of this debate at international level, with possible relevant repercussions at national level, the IOE trusts that the Committee of Social Rights

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<sup>47</sup> Application 31045/10 *The National Union of Rail, Maritime and Transport Workers (RMT) v the UK*, judgment of 8 April 2014 [2014] IRLR 467 paras 87-99. See Viliya Velyvyte, *The Right to Strike in the European Union after Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence* 15 HUMAN RIGHTS LAW REVIEW 73 (2015) at 81 and Alan Bogg and K.D. Ewing, *The Implications of the RMT Case* 43(3) INDUS. L. J. 221 (2014).

<sup>48</sup> Application 36701/09, *Hrvatski Liječnicki Sindikat v Croatia*, judgment of 27 November 2014.

<sup>49</sup> *Ibid.*, para. 59.

<sup>50</sup> See on pensions, Application 13341/14, *da Silva Carvalho Rico v. Portugal*, judgment of 24 September 2015. This finding is consistent with the finding of the ECtHR in Appln No. 57665/12 and 57567/12 *Koufaki and Adedy v Greece*, judgment of 7 May 2013.

<sup>51</sup> *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden*, Complaint No. 85/2012, Decision on admissibility and on the merits, 3 July 2013, (*‘LO and TCO v Sweden’*).

will take into account the current discussion taking place among the ILO tripartite constituents when deciding on the merits of the present complaint.<sup>52</sup>

This did not stop the ECSR finding that Swedish amendments to relevant legislation were in breach of Article 6(4) by virtue of ‘the right of workers and trade unions to engage in collective action for the protection of economic and social interests of the workers’,<sup>53</sup> or reference being made in the decision to ‘the relevant provisions of the ILO conventions Nos 87, 98 and 154’<sup>54</sup> and more generally to ‘internationally binding standards’.<sup>55</sup> The decision of the ECSR finding, *inter alia*, a breach of Article 6(4) has since been endorsed by the Committee of Ministers.<sup>56</sup>

Subsequently, in line with ECtHR findings regarding public sector bargaining, the ECSR (supported by a bare majority in the Committee of Ministers) found that the total restriction of the right to strike of the Irish police force constituted ‘a complete abolition of the right to strike’ in breach of Article 6(4) of the Social Charter. As such, the restriction required further justification. The mere title of ‘police’ (‘Garda Síochána’) was not itself sufficient to warrant complete exclusion of this occupational group from access to collective action, although measures could be taken if prescribed by law, serving a legitimate purpose and necessary in a democratic society for the protection of the rights or freedoms of others or for the protection of public interest, national security, public health or morals.<sup>57</sup> It seems that the ECSR is promoting ‘minimum service’ as the most proportionate way to restrict the right to strike in public sector scenarios.<sup>58</sup> Once again, ILO standards provide an invaluable basis for

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<sup>52</sup> *LO v TCO v Sweden*, Observations by the International Organisation of Employers (IOE) and BusinessEurope, registered at the Secretariat on 7 May 2013, para. 167.

<sup>53</sup> *Ibid.*, para. 120.

<sup>54</sup> *LO and TCO v Sweden*, para. 110.

<sup>55</sup> *Ibid.*, para. 121.

<sup>56</sup> Resolution CM/ResChS(2014)1, 5 February 2014.

<sup>57</sup> Resolution CM/ResChS(2014) 12, 8 October 2014. Notably, in the case before the European Committee of Social Rights, *European Confederation of Police (EuroCOP) v Ireland*, Complaint No. 83/2012, Decision on admissibility and on the merits, 3 July 2013, cited *LO v TCO v Sweden* (at para. 210); and it was the Irish Government that sought to rely on the CEACR General Survey on treatment of the police (at para 196) to no avail. See also for an outline of treatment of ‘public officials’ and ‘essential services’, see Stefan Clauwaert, *The Right to Collective Action (Including Strike) from the Perspective of the European Social Charter of the Council of Europe* 22(3) TRANSFER 405 (2016) at 407 - 408.

<sup>58</sup> Dorssement *supra* note 43 at 86. Cf. advocacy of ‘minimum service’ as a solution in Rochelle le Roux and Tamara Cohen, *Understanding the Limitations to the Right to Strike in Essential and Public Services in the SADC Region* 19 PER/PELJ (2016) at 19.

analysis of compliance with European socio-economic human rights standards, even if not treated as determinative.

It should also be observed that interest in ILO standards is not a purely European phenomenon, for we have also seen the Canadian Supreme Court (SC) referring to the significance of ILO standards and the findings of ILO supervisory bodies in public sector cases. The case which linked the entitlement to freedom of association to collective bargaining (in a way comparable to *Demir & Baykara*) was the British Columbia *Health Services* case.<sup>59</sup> In 2015, in the Saskatchewan case, the Canadian SC was able to confirm that: ‘The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right.’<sup>60</sup> In this way it is arguable that the Canadian Supreme Court goes further than the European Court of Human Rights. While a minority judgment delivered by Rothstein and Wagner JJ cited ‘trouble at the ILO’<sup>61</sup> this was not enough to divert the majority from compliance with mainstream ILO jurisprudence of both the CEACR and the CFA.<sup>62</sup> On this basis the SC found that the Public Service Essential Services Act (PEESA) which placed a total strike ban on those unilaterally designated ‘essential service employees’ without any alternative mechanism for overcoming bargaining impasses constituted a violation of the principle of freedom of association under s.2(d) of the Canadian Charter of Rights and Freedoms.

#### 4. Recent developments in European cases at the ILO

What we see in Europe is that there is a move towards reduction of public spending as well as decrease (and contracting out) of public services. This can be attributed to prompts from Memoranda of Understanding determining the terms of ‘bailouts’ and other ‘financial assistance’ (as emergency measures),<sup>63</sup> but also the more general guidance given in the

<sup>59</sup> *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia* [2007] 2 SCR 391.

<sup>60</sup> *Saskatchewan Federation of Labour v Saskatchewan* 2015 SCC 4, para. 3.

<sup>61</sup> *Ibid.* paras 152-153.

<sup>62</sup> *Ibid.*, paras 67-68. For comment, see Judy Fudge, *Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining and Strikes* 68 CURRENT LEGAL PROBLEMS 267 (2015)

<sup>63</sup> ILO *Report on the High Level Mission to Greece* (Geneva: ILO, 2011), para. 14 and 23. See also Aristeia Koukiadaki and Lefteris Kretsos, *Opening Pandora’s Box: The sovereign debt crisis and labour market regulation in Greece* 41(3) INDUSTRIAL LAW JOURNAL 276 (2012) and Catharine Barnard, *EU Employment Law*

Country Specific Recommendations issued to individual EU Member States as part of the 2020 Growth Strategy.<sup>64</sup> Such measures can also be autonomously adopted due to wholehearted ideological commitment to the orthodoxy of austerity, as the UK and provincial Canadian governments ably demonstrate. With this trend comes restriction of industrial action by those working in the public sector or services of public interest and so too the scope to strike in protest at the measures being taken.

My suggestion is that we can trace these developments by looking at the EU country reports coming before the CEACR and the cases coming to the CFA. There are instances where there has been a positive response to the findings of ILO supervisory bodies. For example, in Estonia a general prohibition of industrial action in the public sector is to be replaced by a list of services where the right to strike will be restricted<sup>65</sup> and in Poland there is hope of reform to exclude those in more junior civil service provisions from the ban on industrial action,<sup>66</sup> although neither piece of legislation has yet been sighted by the CEACR. Also, in Lithuania the Labour Code was amended in 2014 in respect of essential services and arbitration on minimum service.<sup>67</sup> However, overall the issues highlighted before ILO supervisory bodies demonstrate the following overarching trends in the national 'austerity' driven policies of European governments:

- i. Greater restrictions on access of 'civil servants' and 'public sector' workers to industrial action;
- ii. Broadening of the scope of essential services or 'services of public interest' in which workers are prevented from taking industrial action;

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*and the European Social Model: The Past, the Present and the Future* 67 CURRENT LEGAL PROBLEMS 199 (2014) at 230.

<sup>64</sup> [http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/2015/index\\_en.htm](http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/2015/index_en.htm) accessed 2 March 2016 and also see re more explicit requirements to contain wages and reduce public spending - ANNEX to the Recommendation for a COUNCIL RECOMMENDATION on broad guidelines for the economic policies of the Member States and of the Union COM(2015) 99 final 2.3.2015 at 2.

<sup>65</sup> Observation (CEACR) – adopted 2013, published 103rd ILC session (2014) ILO Convention 1948 No. 87 (Estonia).

<sup>66</sup> Observation (CEACR) – adopted 2015, published 105<sup>th</sup> ILC Session (2016) ILO Convention 1948 No. 87 (Poland). The CEACR has recommended that review of which public servants be included in restriction of the right to strike be considered by 'a tripartite body'.

<sup>67</sup> Observation (CEACR) – adopted 2014, published 104<sup>th</sup> ILC session (2015) ILO Convention 1948 No. 87 (Lithuania); and Case No. 2907 (Lithuania), 376<sup>th</sup> Report (2015), esp. at para. 71.



- iii. Increasingly harsh measures taken against trade unions and strikers for their protest related activities.

In respect of all three developments, the ILO supervisory bodies reiterate the established principles noted above, namely that merely having the status of a ‘civil servant’ is not sufficient to justify a State’s decision to exclude that person from access to collective bargaining or the right to strike. Rather, ‘the prohibition of strikes could only be acceptable in the case of public servants exercising authority in the name of the State or of workers in essential services in the strict sense of the term, i.e. services whose interruption could endanger the life, personal safety or health of the whole or part of the population’.<sup>68</sup> This rule is, of course, still subject to the scope given to temporary emergency exceptions,<sup>69</sup> which, as we shall see, seems to have shaped some of the CFA and CEACR responses to measures taken regarding public sector employment in Europe, especially in Greece, Portugal and Spain. However, what these scenarios demonstrate is the enduring relevance of transnational ILO standards on the content and scope of a freedom to strike.

*i. Greater legislative restrictions on strikes in the civil and public service*

In several European States, such as Greece, Portugal and Spain, governments have interfered in the wage-setting and collective bargaining processes, so that legislation is introduced requiring stark cuts to wages.<sup>70</sup> It is perhaps not surprising that, since States wish to reduce the efficacy of trade union collective bargaining in the public sector, access to the right to strike is likewise restricted.

Germany is by no means the only European State where restrictions on strikes extend to civil servants who are not exercising authority in the name of the State, but are performing more usual functions. In particular, it is the status of teachers that most concerns the

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<sup>68</sup> CFA DIGEST, para. 541. To this must also be added temporary emergency measures, for which see further *infra*.

<sup>69</sup> Ibid., paras 570-571.

<sup>70</sup> ILO REPORT ON THE HIGH LEVEL MISSION TO GREECE (2011), para. 152; Observation (CEACR) – adopted 2015, published 105<sup>th</sup> ILC Session (2016) ILO Convention 1949 No. 98 (Portugal); Case No. 3072 (Portugal), 376<sup>th</sup> Report (2015) at para. 900 – 903; Case No. 2947 (Spain), 371<sup>st</sup> Report (2014) at paras 456 - 461.

Committee.<sup>71</sup> This is an issue which overlaps with the approach of the Committee regarding what are to be regarded as ‘essential services’ suitable for restriction of industrial action. For example, despite ILO CEACR criticism and that of its own National Coordination Mechanism on Human Rights, Bulgaria continues its blanket prohibition of strikes in the civil service.<sup>72</sup>

Similarly, in Croatia, new legislation was introduced in 2010 (seemingly prompted by EU level concerns over the rigidity of trade union engagement in wage-setting in the ‘public service’). By 2015 the CEACR was lamenting the lack of a Croatian report on this issue and recommending social dialogue as a strategy for its resolution.<sup>73</sup> This is reminiscent of the CFA’s recommendations regarding Greece.<sup>74</sup>

Indeed, due to sensitivity to the enormity of the economic crisis being experienced by certain countries, social dialogue has been a common recommendation of ILO supervisory organs,<sup>75</sup> but one which is increasingly problematic as genuine trade union representation (which had largely been concentrated in the public sector) declines across Europe.

## *ii. Broadening of the scope of essential services or ‘services of public interest’*

Here, the newly enacted UK Trade Union Act 2016 offers a prime example of new restrictions on industrial action. This legislation imposes strike ballot thresholds (40% of those eligible to vote being in favour together with the general requirement of at least a 50% turnout) which will be applied in respect of strikes which are described as ‘important

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<sup>71</sup> Observation (CEACR) – adopted 2015, published 105<sup>th</sup> ILC session (2016) ILO Convention 1948 No. 87 (Germany); Observation (CEACR) – adopted 2014, published 104<sup>th</sup> ILC session (2015) ILO Convention 1948 No. 87 (Denmark); see also CFA Case No. 3039 (Denmark), 373<sup>rd</sup> Report (2014) at para. 261.

<sup>72</sup> Observation (CEACR) – adopted 2014, published 104<sup>th</sup> ILC session (2015) ILO Convention 1948 No. 87 (Bulgaria).

<sup>73</sup> Observation (CEACR) – adopted 2015, published 105<sup>th</sup> ILC session (2016) ILO Convention 1949 No. 98 (Croatia).

<sup>74</sup> Case 2820 (Greece), 365<sup>th</sup> Report (2012) at para. 1003 where the CFA recommended that: ‘the Government promote and strengthen the institutional framework for collective bargaining and social dialogue and urges, as a general matter, that permanent and intensive social dialogue be held on all issues raised in the complaint and in its conclusions with the aim of developing a comprehensive common vision for labour relations in the country in full conformity with the principles of freedom of association and the effective recognition of collective bargaining and the relevant ratified ILO Conventions.’

<sup>75</sup> See Case No. 3072 (Portugal), 376<sup>th</sup> Report (2015) at para. 927.

public services'.<sup>76</sup> This seems to be a response to a growing tendency in the UK for there to be public sector strikes, this being the most unionised sector, but also where the greatest changes have recently been seen in terms of restructuring around budget cuts.<sup>77</sup>

Regulations will specify to which 'important public services' this rule applies. At the time of writing the draft Regulations published indicate that the following categories of services will be covered by this additional requirement: (a) health services; (b) education of those aged under 17; (c) fire services; (d) transport services; and (e) border security.<sup>78</sup> In the course of the drafting process, it has been decided that 'ancillary' workers will not be covered by these special measures.<sup>79</sup>

The UK initiative goes against the longstanding findings of the CFA and CEACR that teachers and transport workers, 'irrespective of their status do not amount to exercising authority in the name of the State'<sup>80</sup> and are not truly essential services.<sup>81</sup> This is also because 'a requirement of the support of 40 per cent of all the workers to carry out a strike would constitute an obstacle to the right of workers' organizations to carry out their activities without interference'.<sup>82</sup> Rather, it is recommended that the UK have recourse to 'negotiated minimum services' as appropriate.<sup>83</sup> These are findings that arguably come as no surprise being consistent with the longstanding jurisprudence of the CFA and CEACR.<sup>84</sup> If the UK Conservative Government modifies its plans in line with these recommendations that might, however, limit its ability to make a planned £12 billion of spending cuts predominantly in

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<sup>76</sup> See Michael Ford and Tonia Novitz, *Legislating for Control: the Trade Union Act 2016* 45(3) INDUSTRIAL LAW JOURNAL 277 (2016).

<sup>77</sup> Kurt Vandaele, *Interpreting Strike Activity in Western Europe in the Past 20 Years: The labour repertoire under pressure* 22(3) TRANSFER 277 (2016) at 285 and 291.

<sup>78</sup> Trade Union Bill, clause 3 inserting after s.226A *inter alia* s.226(2E). See also the Government response to the consultation on ballot thresholds in important public services, January 2016, Annex B, 'Skeleton regulations'.

<sup>79</sup> See <http://www.parliament.uk/documents/commons-public-bill-office/2015-16/compared-bills/Trade-Union-Bill-As-Amended-in-Cttee-Trackd-changes.pdf>, last checked 2 March 2016.

<sup>80</sup> Observation (CEACR) – adopted 2015, published 105<sup>th</sup> ILC session (2016) ILO Convention 1948 No. 87 (Germany).

<sup>81</sup> Observation (CEACR) – adopted 2015, published 105<sup>th</sup> ILC session (2016) ILO Convention 1948 No. 87 (UK).

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Michael Ford and Tonia Novitz, 'An Absence of Fairness ... Restrictions on Industrial Action and Protest in the Trade Union Bill 2015' 44(4) *ILJ* 522 (2015) at 528-533.

the public services sector because the trade unions might effectively protest against it doing so.<sup>85</sup>

Civil mobilization orders initiated by the Greek Government to curtail industrial action in public transport and secondary education (again with large budgetary objectives in mind) were also criticized by the CEACR because the industrial action could not be such as to endanger the life, personal safety or health of the whole or part of the population.<sup>86</sup>

Further, the scope of minimum service requirements in legitimate essential services has been systematically heightened in various States, such as Hungary and Spain, again generating criticism from the CEACR.<sup>87</sup> For example, in Hungary the minimum level of service in the local and suburban passenger transport services is 66% and national and regional passenger transport services is 50% which the CEACR. In this respect the CEACR has recalled that ‘the minimum service must genuinely and exclusively be a minimum service, that is one limited to the operations which are strictly necessary to meet the basic needs of the population...’ – as it stands ‘it is practically impossible to organize or maintain a lawful strike’.<sup>88</sup> In Spain, the Committee is recommending that the State ‘address through tripartite dialogue the operation of the procedures for the determination of minimum services’.<sup>89</sup>

*iii. Harsh measures taken against trade unions and strikers for their protest related activities.*

Finally, what emerges from the issues reaching the CEACR and CFA is that, while trade unions are organising protest against austerity measures, European States are reacting in increasingly repressive ways.

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<sup>85</sup> Ford and Novitz *supra* note 76 at 293.

<sup>86</sup> Observation (CEACR) – adopted 2014, published 104<sup>th</sup> ILC session (2015) ILO Convention 1948 No. 87 (Greece).

<sup>87</sup> Observation (CEACR) – adopted 2014, published 104<sup>th</sup> ILC session (2015) ILO Convention 1948 No. 87 (Hungary); Observation (CEACR) – adopted 2015, published 105<sup>th</sup> ILC session (2016) ILO Convention 1948 No. 87 (Spain) and Direct Request (CEACR) – adopted 2012, published 102<sup>nd</sup> ILC Session (2013) ILO Convention 1948 No. 87 (Spain).

<sup>88</sup> Observation (CEACR) – adopted 2015, published 105<sup>th</sup> ILC session (2016) ILO Convention 1948 No. 87 (Hungary).

<sup>89</sup> Observation (CEACR) – adopted 2015, published 105<sup>th</sup> ILC session (2016) ILO Convention 1948 No. 87 (Spain).

For example, the Belgian Government had engaged in a strategy of ‘arrests, certain of which were taken as a preventative measure... at the Euro-demonstration organized in Brussels by European trade unions’. When the CEACR came to comment on this conduct in 2013, the Committee noted that the investigations of this incident had not been made public.<sup>90</sup> In Greece, penal measures against non-violent protests by seafarers were highlighted,<sup>91</sup> while in Malta, there are ongoing allegations of anti-union dismissals by public officers, and reports of portworkers and public transport workers who are excluded through legislation from the jurisdiction of industrial tribunals and only have recourse to a Public Service Commission.<sup>92</sup> In Poland, there are allegations of prohibition of display of trade union flags and violent police intervention in demonstrations and pickets.<sup>93</sup> In Spain, it is alleged by the ITUC and Spanish Trade Union Confederation that a new Act of 2015 will restrict freedom of assembly, expression and demonstration ‘essential to freedom of association’.<sup>94</sup>

Moreover, workers’ voices are now being cancelled out of consultative processes. For example, in Denmark, a new piece of legislation was announced by the Prime Minister on 25 April 2013, adopted by Parliament the following day and entered into force on 27 April 2013 which amended and extended collective agreements for certain groups of workers in the public sector without responding to trade union concerns. The Government was assisted only by employers in the preparation of the Bill.<sup>95</sup> This is a pattern becoming familiar in various other EU Member States. In Greece, certain key measures were adopted not only without social dialogue but without Parliamentary debate by the Ministerial Council, see Act6/2012; a comparable failure of social dialogue can be found in Romania where the so-

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<sup>90</sup> Direct request (CEACR) – adopted 2013, published 103<sup>rd</sup> ILC session (2014), ILO Convention 1948 No. 87 (Belgium).

<sup>91</sup> Observation (CEACR) – adopted 2014, published 104<sup>th</sup> ILC session (2015) ILO Convention 1948 No. 87 (Greece).

<sup>92</sup> Observation (CEACR) – adopted 2015, published 105<sup>th</sup> ILC Session (2016) ILO Convention 1949 No. 98 (Malta).

<sup>93</sup> Observation (CEACR) – adopted 2015, published 105<sup>th</sup> ILC Session (2016) ILO Convention 1948 No. 87 (Poland).

<sup>94</sup> Observation (CEACR) – adopted 2015, published 105<sup>th</sup> ILC session (2016) ILO Convention 1948 No. 87 (Spain).

<sup>95</sup> CFA Case No. 3039 (Denmark), 373<sup>rd</sup> Report (2014) at para. 261.

called ‘Social Dialogue Act’ of 2011 was ‘passed unilaterally by the government without being debated in parliament and without involving the social partners’.<sup>96</sup>

In Hungary, anti-union measures against trade union officials or affiliates are said to be rife and the CEACR has again recommended ‘a forum of dialogue’ to address the issue.<sup>97</sup>

However, the recommendation of such dialogue does not mesh well with the newly adopted Hungarian Labour Code, sections 8 and 9 of which ‘prohibit any conduct of workers including the exercise of their right to express an opinion – whether during or outside working time – that may jeopardize the employer’s reputation or legitimate economic and organizational interests’.<sup>98</sup>

## 5. An unfettered right to ‘political’ action?

Finally, in response to IOE concerns, we might wish to reflect on whether ILO principles give an unfettered right to take ‘political’ action in the context of the public sector. Indeed, the term ‘political strike’ has become associated with illegality and disapprobation.<sup>99</sup> In the UK, for example, such strikes do not merit statutory protection under the Trade Union and Labour Relations (Consolidation) Act 1992 (section 244(1)). The problem of course, as Lord Justice Roskill sagely commented in *Sherard v AUEW*, is that: ‘It is all too easy for someone to speak of a strike as being a ‘political strike’ when what that person really means is that the object of the strike is something which he [sic] as an individual subjectively disapproves.’<sup>100</sup> In so doing, he pointed to the potentially indeterminate content of the exception and consequent susceptibility to manipulation by government and employers.

There may be a legitimate fear that ‘purely political strikes’ will be disruptive of democratic processes. However, bearing in mind their indeterminacy of content and the entitlement of

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<sup>96</sup> Aurora Trif, *Romania: collective bargaining under attack* 19(2) *Transfer* 227 (2013) at 233. See also Koukiadaki and Kretsos *supra* note 63.

<sup>97</sup> Observation (CEACR) – adopted 2014, published 104<sup>th</sup> ILC session (2015) ILO Convention 1949 No. 98 (Hungary).

<sup>98</sup> Observation (CEACR) – adopted 2014, published 104<sup>th</sup> ILC session (2015) ILO Convention 1948 No. 87 (Hungary).

<sup>99</sup> Novitz, *supra* note 13 at 56.

<sup>100</sup> *Sherard v AUEW* [1973] ICR 421 at 435 per Roskill LJ. See for a similar view, OTTO KAHN-FREUND, PAUL DAVIES AND MARK FREEDLAND, *LABOUR AND THE LAW*, 3<sup>RD</sup> EDN. (1983), 315.

workers to act in their economic and social interests (as identified not only by the ILO but human rights institutions such as the ECtHR and the ECSR) it is inappropriate to speak of 'political strikes' as if they constituted an amorphous mass of iniquity. After all, strikes may be capable, not only of undermining, but also of facilitating democratic participation.<sup>101</sup>

So, how might strikes be 'political'? The political elements of industrial action can be identified in a number of ways:

1. A challenge to the conventional and established managerial powers of the employer and in this sense any strike has a political element in that it challenges the established order whereby an employer instructs and a worker obeys.<sup>102</sup> It is little wonder then that strikes are not popular with employers in terms of what they represent regarding the capacity for rebellion inherent in any workforce. However, the clear indication by ILO supervisory bodies (and other human rights institutions) that workers are entitled to pursue their economic and social interests suggests that this challenge to the societal status quo is not sufficient to render strike action illegitimate.
2. The adjective 'political' can also be used to describe actions taken that are ideologically motivated, for example addressing some facet of an employer's business that does not relate to their immediate workers' terms and conditions of employment. However, such policies may still have an effect on workers, for example in environmental terms or related to the delivery of public (such as medical) services. In this sense, the ILO view that workers can take action to protest on such matters seems appropriate even if it will be subject to a test of proportionality whether imposed by legislation or reviewed by courts (such as the ECtHR).
3. The term 'political' can also be used merely because a strike takes place in the public

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<sup>101</sup> Novitz, *supra* note 13 at 295.

<sup>102</sup> In this sense, any strike is political. See for comment Melvin F. Williams, *Control at All Costs: South African Security Legislation and the Trade Unions* 30 *HARV J. OF INT'L L.* 477 (1989) who states at 479 that when the worker 'joins the union he enters into a power relationship with the employer, and whether through strike action or negotiations, that worker has engaged in a political act'.

sector and therefore impinges on a government's ability to deliver public services.<sup>103</sup> This is a naïve view of the public sector which arguably confuses the State as an employer with the State as a political actor, as identified by Sandra Fredman and Gillian Morris in their past comprehensive discussion of public sector employment.<sup>104</sup> Given that the State is an extraordinarily powerful employer, capable of manipulating the terms of public sector employment for its own larger budgetary and political purposes, there is arguably all the more reason to protect public sector workers rather than abandoning them to governmental dictates. In this sense, the ILO jurisprudence limiting the scope of civil servant and public service exceptions according to the core operations of the administration of the State and protection of the health, safety and well-being of the population seems more than defensible.

4. A fourth possibility is that strikes may be aimed at ending government by a particular political party or mode of government (for example, a revolution). This will be anti-democratic when aimed at a democratic government, but in terms of strikes taken in protest at non-democratic regimes, one might applaud this action especially when taken in coalition with other elements of civil society as was the case in Poland in the 1980s and South Africa into the 1990s. So much is evident from ILO investigations of the industrial relations systems of those countries at that time.<sup>105</sup>

However, leaving aside the scope of the legitimate restriction on 'purely political strikes', it seems vital to return to the basic understanding of a right to defend the social and economic interests of workers. This is a claim to voice (being subdued in the face of economic dictates in Europe and elsewhere). It is also a claim, as the Canadian Supreme Court has noted (relying on ILO authority), to dignity at work.<sup>106</sup> So that workers' terms and conditions are not merely

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<sup>103</sup> See *supra* note 12.

<sup>104</sup> SANDRA FREDMAN AND GILLIAN MORRIS, *THE STATE AS EMPLOYER: LABOUR RELATIONS IN THE PUBLIC SERVICES* (1986); see also Sandra Fredman and Gillian Morris, *The State as Employer: is it Unique?* 19 *INDUS. L. J.* 142 (1990).

<sup>105</sup> ILO, *REPORT OF THE COMMISSION INSTITUTED TO EXAMINE THE COMPLAINT ON THE OBSERVANCE BY POLAND OF CONVENTIONS NOS. 87 AND 98* (1984) *Official Bulletin, Special Supplement*, Vol. LXVII, Series B; and ILO, *REPORT OF THE FACT-FINDING AND CONCILIATION COMMISSION ON FREEDOM OF ASSOCIATION CONCERNING THE REPUBLIC OF SOUTH AFRICA* (1992) *Prelude to Change: Industrial relations in South Africa*, *Official Bulletin, Special Supplement*, Vol. LXXV, Series B.

<sup>106</sup> *Saskatchewan Federation of Labour v Saskatchewan* 2015 SCC 4 at para. 54: 'The ability to strike ... allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective



dictated by an employer, but rather they have the ability (which they could not have individually) collectively to challenge these. There are indications in Europe, in the repression of trade union protest, of a desire on the part of governments and employers to prioritise economic objectives at the expense of longstanding protections of civil, political and social rights.<sup>107</sup> The ILO jurisprudence on the right to strike in the civil service, public sector and essential services offers a global touchstone to inform criticism of such an approach to industrial relations.

It has been argued here that, far from being unrestricted, ILO supervisory bodies have been cautious in their development of norms. Their jurisprudence is detailed and far-reaching in terms of its influence, but there is no unfettered freedom to strike. Rather, ILO processes offer proportionate guidance on difficult issues, which was arrived at, not only by legal experts, but through important tripartite compromise between the interests of governments, workers and employers. The utility of these principles is reflected in the attention they receive from other human rights institutions and their enduring relevance has been highlighted by the European financial crisis, where similar issues arise in a variety of States. To abandon these standards now and return to national level determinations of the content and scope of the right to strike seems an unpalatable and irrational alternative.

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action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.'

<sup>107</sup> See Tonia Novitz, *The EU and the Right to Strike: Regulation Through the Back Door and its Impact on Social Dialogue* 27(1) KING'S L.J. 46 (2016).